STATE OF WISCONSIN PERSONNEL COMMISSION

RUTH A. BJORK,
Complainant,

v.

Secretary, DEPARTMENT OF FINANCIAL INSTITUTIONS,
Respondent.

Case No. 01-0036-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

Respondent filed a motion to dismiss the above-noted case contending that no relief could be granted for the stated claims. Both parties filed written arguments. The final argument was filed on August 16, 2001.

The findings of fact recited below are made solely to resolve this motion. All disputed facts are recited in a light most favorable to the complainant, as is appropriate in the context of the present motion.

FINDINGS OF FACT

1. Complainant filed a discrimination complaint on March 15, 2001. She alleged discrimination on the bases of age, creed, disability and sex, as violations of the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats. She further alleged retaliation based on her participation in activities protected under the FEA and protected under the Whistleblower Law, Subch. III, Ch. 230, Stats.

2. Complainant checked boxes on the complaint form indicating that the alleged discrimination and retaliation occurred with respect to "Discipline," "Harassment," "Termination," and "Other conditions of employment."

3. Complainant was hired by respondent on December 4, 2000 as a Program Assistant 3, and was required to serve a permissive probationary period. Her supervisor was Kenneth L. Hojnacki, Director of the Bureau of Licensing and Compliance in respondent's Division of Securities. He made the decision to hire complainant. He also made the decision

to terminate her employment on March 9, 2001, prior to the end of her probationary period. (See narrative attached to the complaint, p. 1. Also see Exh. 1 attached to respondent's motion.) Complainant thereafter returned to her prior employer.

4. Part of complainant's job was to delete information from computer queues using a computer system relied on by all 50 states and the Securities and Exchange Commission in the regulation of securities. The task of deleting information sometimes took complainant up to 7 hours a day. She asked Mr. Hojnacki, if the system could be changed to eliminate the need for this task. He said there was nothing that could be done about it and it was a low priority. (See narrative attached to the complaint, p. 1.)

5. Complainant found the job required her to sit at a computer more than she had anticipated. She has muscular-skeletal weakness that is aggravated by too much sitting. She requested an accommodation of a workstation where she could use the computer from a sitting or standing position. She was asked to provide medical documentation and she did. Respondent then provided the accommodation. Thereafter, complainant retained her original workstation and also had available in a different room, a computer she could use in a standing position (hereafter, the standing computer). (See narrative attached to the complaint, pp. 1-2.)

6. When complainant was asked to provide medical documentation for the accommodation, she told Mr. Hojnacki that she had a problem with her prior employer who failed to keep her medical information confidential. She did not want this to happen again (see p. 3, Exh. 1, attached to respondent's motion). Mr. Hojnacki also was aware that her prior employer had made accommodations for her back (see p. 1, Exh. 1, attached to respondent's motion).

7 After the accommodations were in place, Mr. Hojnacki told complainant that he was concerned that if she spent time at the standing computer she would be unable to answer her telephone. She suggested that a telephone line also be installed in the room with the standing computer. He further indicated that if it looked like the standing computer would work as an accommodation, respondent would consider modifying her workstation to install a standing computer there but he noted that this would be "a bigger project to plan." (Complainant's letter dated August 7, 2001, p. 1 and Exh. B attached to complaint.)

8. Complainant became disillusioned about her job because it required so much computer work. On February 12, 2001, Mr. Hojnacki called complainant into his office and asked if something was wrong. She said the queue retrieval process was inefficient, time consuming, a waste of money and she was bored with the task. Mr. Hojnacki again said nothing could be done about it and it was a low priority. He became agitated and told her she knew there was a lot of computer work when she took the job. She acknowledged that all jobs have mundane tasks "but when the takes take over 80% of the day it's not good." She then advised Mr. Hojnacki that she would have to look for other employment "because I was in so much pain." (See narrative attached to the complaint, p. 2. Date provided on p. 5 of Exh. 1 attached to respondent's motion.)

9. On February 20, 2001, Mr Hojnacki called complainant into his office. He said he had spoken with Patti Struck, respondent's Administrator of Securities Division and Lee Isaacson, respondent's Human Resource Manager. He said he could not change the NASD computer because 50 states were involved. He suggested that complainant should resign effective April 30, 2001, so respondent could start looking for a new person to fill the position. Complainant said she would not resign. (See narrative attached to the complaint, p. 2 and Exh. O attached to complainant's letter dated May 14, 2001.)

10. Complainant notes that the standing computer "was not capable of allowing the printouts required, and necessitated my placing the needed information to another queue. I would then have to return to my workstation and retrieve the saved information and print it." Complainant felt this situation was inefficient. (See narrative attached to the complaint, pp. 1-2 and Exh. O attached to complainant's letter date May 14, 2001.)

11. Complainant was unaware prior to March 9, 2001, that respondent thought her job performance was unsatisfactory. (See page 2 of the attachment to complainant's letter dated May 14, 2001.)

12. On March 9, 2001, complainant went to Mr. Hojnacki's office at his request. Also present was David Cohen, an attorney employed by respondent. Complainant felt outnumbered, apprehensive and intimidated by the scene. She asked what the meeting was about and why the attorney was present. Mr. Hojnacki ordered complainant to sit down and

said it was not a disciplinary meeting and the attorney was there as a witness. Mr. Hojnacki then said it was time for her 3-month review (performance evaluation) and that he did not know what he was going to review. He asked if complainant remembered the February 12th meeting where he asked for her resignation. Complainant rose from her chair, said she wanted a union representative as her witness and returned to her desk. Mr. Hojnacki went to complainant's desk and with clenched teeth ordered her back to his office. He also told complainant that she had no rights and no right to say anything as a probationary employee. She felt humiliated. She reluctantly returned to his office where the meeting continued. During the meeting, Mr. Hojnacki asked if complainant had learned how to license a broker yet and complainant considered this to be a verbal assault. She said she had not had the time to learn this task due to the time it took to delete information from the computer and she noted that the computer's response time was slow. Mr. Hojnacki gave her the options of resigning or being terminated. She said she would not resign. Accordingly, she was terminated the same day. (See narrative attached to the complaint, pp. 2-3.)

13. Complainant requested at the March 9th meeting (see prior paragraph) that she be given queue totals from the time she was hired until her last day of work, as well as the same information from the same time period of the previous year so she could prove an increased work volume. Respondent has not given her this information. (See narrative attached to the complaint, p. 3.)

14. An Equal Rights Officer wrote to complainant on April 10, 2001, and provided the FEA definition of creed (§111.32(3m), Stats.). The Equal Rights Officer asked complainant to identify her creed based on the statutory definition, to explain what employment requirement conflicted with her creed, to identify who she informed about the conflict and to state whether she alleges that she was discharged for refusing to comply with a particular employment requirement based on her creed. Complainant responded (see pp. 1-2 of attachment to letter dated May 14, 2001) that her creed is her "Christian belief and is one of the 10 Commandments of God is that lying is wrong." She does not contend she was required to lie in the performance of her duties. Rather, she alleges that she was told the following lies:

i. Ken Hojnacki never informed complainant that the majority of her position would be based on deleting information from the NASD computer
ii. The position description included many more responsibilities than any human could possibly accomplish.
iii. That as a human, complainant could not have any limitations.
iv. That complainant would be terminated because she could not be allowed to be human and run out of time.
v. Hojnacki lied when he said the March 9th meeting was not a disciplinary meeting.

15. Complainant shared her opinion in a verbal discussion with Mr. Hojnacki that the way the NASD computer was being used was a waste of her time as an employee and a taxpayer and was inefficient. (See p. 2 of attachment to letter dated May 14, 2001.) While she took notes of the meeting (see Exh. O attached to letter dated May 14, 2001), complainant did not provide a copy of her notes to Mr. Hojnacki.

16. Complainant is a female who was born on April 15, 1948. She was 51 years old when respondent terminated her employment. (See, complaint.) Mr. Hojnacki is 41 days younger than complainant. (See, page 8 of Exh. 1 attached to respondent's motion submitted under cover letter dated June 21, 2001.)

17 CN[1], a female whose age is unknown, worked in the position before complainant. CN was fired after a month on the job. SF, a female whose age is unknown, worked in the position before CN. SF resigned within a year (See complainant's letter dated August 7, 2001, p. 3.)

18. There were three additional Program Assistant (PA) positions in the unit where complainant worked, all under the supervision of Mr. Hojnacki. MG, a female born on 2/12/59, was on permissive probation as a PA3 and later passed probation. BS, a female born on 12/3/76, worked as a limited term employee (LTE) in a PA1 position. GT, a female born on 7/16/44, worked as a PA4 and had made a disability accommodation request. (See page 2 of Exhibit 5 attached to respondent's motion.) It is unknown whether Mr. Hojnacki hired GT or was involved in the decision to pass her off of probation.

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[1] Initials have been substituted for the names of the individuals in this paragraph and elsewhere in this ruling.

19. Mr Hojnacki supervised 21 positions (including complainant's). Seven of the individuals are older than complainant. Twelve are females. None have made a protected disclosure under the Whistleblower Law. (See pages 1-2 of Exhibit 5 attached to respondent's motion.) It is unknown which positions Mr. Hojnacki was involved with in the hiring or probationary period decisions.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §§230.45(1)(b) and (gm), Stats.

2. Complainant failed to establish that she was discriminated against due to her creed.

3. Complainant failed to establish that she participated in an activity protected under the Whistleblower Law and, accordingly, failed to establish that respondent retaliated against her in violation of that law.

4. Complainant failed to establish that she participated in an activity protected under the FEA and, accordingly, failed to establish that respondent retaliated against her in violation of that law.

5. Complainant failed to establish a claim regarding discipline.

6. Complainant failed to establish a claim regarding harassment.

7 Complainant failed to establish a claim regarding other conditions of employment.

OPINION

1. Failure to State a Claim – Standard of Review

The Commission, by letter dated July 6, 2001, advised complainant as noted below:

> Respondent claims in its motion that complainant has not alleged sufficient facts to support her claims. Accordingly, she is advised that it would be to her benefit to include in her [written arguments] a statement of all facts she feels are relevant to her claim.

The following standard of review was recited in the letter, citing *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89 (quoting *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N W.2d 660 (1979) (citations omitted)); affirmed, *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992):

> [T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
>
> . A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

II. Whistleblower Claim

Complainant claims she was retaliated against due to activities protected under the Whistleblower Law. Resolution of this claim involves a question of law appropriate for resolution in context of the present motion.

Complainant contends her protected disclosure is based upon verbal conversations with Mr. Hojnacki. However, she never provided him with a written statement of her concerns and, accordingly, has not made a protected disclosure under §230.81(1)(a), Stats. She does not claim any other type of protected disclosure under §230.81(1), Stats. She, therefore, is not entitled to protection against retaliation under the Whistleblower Law. Respondent's motion to dismiss is granted on this claim.

III. Creed Claim

Resolution of complainant's claim that she was discriminated against because of her creed also involves a question of law. The FEA prohibits employers from taking certain actions against an employee *because of* the employee's protected status. This principle is embedded in §111.321, Stats., which provides that "no employer may engage in any act of employment discrimination against any individual *on the basis of* creed ." (emphasis added). Employers also are required to make certain accommodations for an employee's creed, as noted in §111.337, Stats.

Complainant does not allege that actions were taken against her *because of* her creed. Nor does she allege that respondent failed to accommodate her creed. Rather, she contends that Mr. Hojnacki lied and that lies are contrary to her religious beliefs. (See ¶14, Findings of Fact.) This contention is insufficient to sustain a claim of creed discrimination under the FEA. Respondent's motion to dismiss is granted on this claim.

IV FEA Retaliation Claim

The basis is unclear for complainant's claim that respondent retaliated against her for engaging in activities protected under the FEA. It appears she is claiming that her request for an accommodation, as described in ¶5, Findings of Fact, is the claimed protected activity.[2]

The only potential FEA provision pertinent here is §111.322(3), Stats., the text of which is shown below:

> [I]t is an act of employment discrimination
>
> (3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she had made a complaint, testified or assisted in any proceeding under this subchapter.

Complainant asked for a standing computer workstation as an accommodation for her back and respondent complied with her request. As a matter of law, complainant's actions cannot be characterized as opposing any discriminatory practice under the FEA, as making a complaint, or as testifying or assisting in a proceeding under the FEA. Rather, she sought and promptly received an accommodation on an informal basis (without filing a complaint).

The retaliation provisions of the FEA simply do not cover the claimed protected activity. Accordingly, respondent's motion to dismiss is granted on this claim.[3]

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[2] See pp. 2-3 of the attachment to complainant's letter dated May 14, 2001. She specifically states that the retaliation "came as the result of" providing medical documentation to respondent that "so much sitting was considered a work related problem resulting in a work-related injury."

[3] As demonstrated by the results of this ruling, even if this claim is not protected under the retaliation prohibitions of the FEA, it still could be sufficient to sustain a claim of disability discrimination.

V Age and Sex Claims

The initial burden of proof under the FEA is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Complainant may establish a prima facie case of discrimination in a discharge case by showing that: (1) she is a member of a group protected under the FEA, (2) she was discharged, (3) she was qualified for the job, and (4) either she was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985); followed in *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N.W.2d 572 (Ct. App. 1997) and in *Eleby v. LIRC*, 223 Wis. 2d 802, 589 N.W.2d 456 (Ct. App. 1998). Complainant's evidence, as noted previously, is evaluated here under the lower probable cause level of proof.[4]

Complainant established the first three elements of the prima facie case. She is a member of a group protected under the FEA due to her age and sex. She was discharged. She was qualified for the job as evidenced by respondent's recent decision to hire her and by her statement that no one told her problems existed with her performance (see ¶11, Findings of Fact). Her statement must be accepted as true in the context of the present motion.

One argument relied on by respondent is that complainant failed to establish the fourth element of the prima facie case. Specifically, she has not shown that someone of a different age or sex was either treated more favorably or was hired to replace her. The Commission rejects respondent's argument. The Commission first notes that under *Phillips*, *Id.*, the facts pleaded must be taken as true. Furthermore, the age and sex of the person hired to replace complainant is solely within the realm of respondent's knowledge and has not been divulged by

[4] The term "probable cause" is defined in §PC 1.02(16), Wis. Adm. Code as: "means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint."

respondent in the numerous pages submitted as evidence in this case. Also, complainant is unrepresented by counsel and unfamiliar with discovery procedures. Under these circumstances, she should not be required to conduct discovery as a prerequisite to having her case investigated by the Commission.[5] For the similar reasons, complainant should not be expected to have extensive knowledge of whether others were given more favorable treatment at this stage of the proceedings. Accordingly, the Commission will presume for purposes of this motion that complainant established a prima facie case of sex and age discrimination.

Respondent contends that the only reason complainant was terminated was because of her poor performance. Respondent's assertion subsumes a request for the Commission to determine at this stage in the proceedings that sex or age was not a factor.

Even if respondent's contention were accepted as meeting its burden to articulate a legitimate reason for complainant's discharge, complainant has shown pretext. Specifically, respondent never told her prior to the day she was discharged that problems existed with her work performance. Respondent's motion, accordingly, is denied as to these claims.

VI. Disability Claim

Complainant contends she was discharged because of her disability. The shifting burdens of proof discussed in the prior section apply here as well. The elements of a prima facie case here are as noted in the prior section. The only difference is the first element requires complainant to show that she is an individual with a disability, defined in §111.32(8), Stats., as shown below:

> "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

[5] Expectations may be different for a case pending hearing but only after the discovery process has been described to an unrepresented complainant and the parties have had an opportunity to conduct discovery.

Complainant has shown that she is an individual with a disability in the context of this motion, which requires the Commission to accept her assertions as true and under the lower evidentiary standard of probable cause. Respondent accommodated complainant's medical condition but did so only after determining that she had provided sufficient medical documentation of the need for the accommodation. Further, Mr. Hojnacki was aware that complainant had a record of such impairment. He knew that complainant's prior employer had required medical documentation for accommodations requested there (see ¶6, Findings of Fact).

Respondent's assertion that the only reason complainant was discharged was because of poor work performance presents the same concerns as discussed in the prior section. However, even if respondent's contention were accepted as meeting its burden to articulate a legitimate reason for complainant's discharge, complainant has shown pretext. First, she was never told before she was terminated that her work was unsatisfactory. Furthermore, as noted in ¶7 of the Findings of Fact, Mr. Hojnacki voiced concerns about having to provide the accommodation on a temporary basis and the potential of having to provide the accommodation on a permanent basis. Also, less than a month before her termination, complainant told him that the temporary accommodation was not meeting her medical needs (see ¶¶8-9, Findings of Fact). Respondent's motion, accordingly, is denied as to this claim.

VII. Other Claims

The preceding analysis addresses the "termination" box complainant checked off on the complaint form. This section addresses the other boxes checked (see ¶2, Findings of Fact).

Complainant also checked the "*discipline*" box on the complaint form. It is clear, however, that no discipline occurred in the traditional sense of an action imposed for a work rule violation. No viable claim of discipline has been alleged.

Complainant checked the "*harassment*" box on the complaint form. Harassment claims must be based on evidence that an employee was harassed because of a protected status and that such harassment was sufficiently severe or pervasive. Many factors are pertinent to this

inquiry, as explained in *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-807 (7th Cir. 2000):

> [H]arassment is actionable only when it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. at 2405, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir 1982). Whether the harassment rises to this level turns on a constellation of factors that include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). We also assess the impact of the harassment upon the plaintiff's work environment both objectively and subjectively. The work environment cannot be described as "hostile" . unless a reasonable person would find it offensive and the plaintiff actually perceived it as such. *Faragher*, 118 S. Ct. 15 2283, citing *Harris*, 510 U.S. at 21-22, 114 S. Ct. 370-71.

The findings of fact recited in this ruling address all alleged adverse actions raised in the initial complaint. Complainant also mentioned in answer to respondent's motion that respondent failed to select her to test a new computer system and that she was not provided adequate training. She has not alleged that she was not selected to test the new system because of any protected status. Her statement about training was offered as an explanation of why she may not have performed as well as respondent expected. It was not a reference to any specific training opportunity that was denied. Nor did she allege that she did not receive adequate training because of any protected status. Furthermore, these actions were neither sufficiently pervasive nor severe to support a harassment claim. Accordingly, no viable claim of harassment has been alleged under the general principles recited above or under §111.36(b) or (br), Stats.

The last box checked by complainant on the complaint form was "*Other conditions of employment.*" As noted in the prior paragraph, the only actions mentioned other than termination were that respondent failed to select her to test a new computer system and that she

was not provided adequate training. Again, complainant alleged that the termination was due to a protected status, but did not make the same allegation with respect to the other actions.

Based on the foregoing, only the termination issue has survived respondent's motion and only on certain claimed protected bases. The surviving claims are noted in the following statement of the issues in this case:

> Whether probable cause exists to believe that respondent's decision to terminate complainant's employment on March 9, 2001, was based on her age, sex or disability. Sub issue: Whether complainant is an "individual with a disability" within the meaning of §111.32(8), Stats.

ORDER

Respondent's motion to dismiss is granted in part and denied in part as noted in this ruling.

Dated: November 14, 2001. STATE PERSONNEL COMMISSION

JMR:010036Crul1

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner